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EXAMINER

KUPSTAS, TOD A

ART UNIT	PAPER NUMBER
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2153

DATE MAILED: 01/14/2003

FP17

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/256,647

Applicant(s)

CHU ET AL.

Examiner

Tod Kupstas

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 24 October 2002.

2a) This action is **FINAL**.                            2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 1-3,5-9,16,17 and 19-33 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) 1-3 and 5-9 is/are allowed.

6) Claim(s) 16,17,19-22 and 24-33 is/are rejected.

7) Claim(s) 23 is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) Notice of References Cited (PTO-892)                            4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_ .

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)                    5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ .                    6) Other: \_\_\_\_\_

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## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371<sup>®</sup> of this title before the invention thereof by the applicant for patent.

2. Claims 24-29 are rejected under 35 U.S.C. 102(e) as being anticipated by Bisdikian et al (US 6,205,413).

As set forth in claim 24, Bisdikian discloses in a network monitoring system for monitoring network-based services over a distributed network accessible by user devices capable of collecting data about end-user experience and communicating network performance data to an experience test server, a method of monitoring network-based services; see col. 3, lines 37-51, comprising: configuring the user devices to notify the experience test server of an availability to perform network tests in response to being connected to the distributed network; see col. 3, line 51-col. 4, line 9; distributing instructions from the experience test server to the user devices that are available to perform network tests, in accordance with notifications from the user devices, wherein at least some of the instructions direct the user devices to perform network tests; see col.

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5, lines 12-55 and collecting, at the experience test server, network performance data generated by the user devices that perform the network tests (web server 41 may store the results of the tests in a database). Bisdikian discusses the usage of test servers in the process of monitoring the system and that during this monitoring of the system the subscribers will be in contact with the test servers in order to determine various features of the system. In order to perform these tests the subscribers in Bisdikian must notify the test servers of their existence and willingness to perform tests. Furthermore the tests servers must in turn perform in accordance to the tests done with the subscribers.

As set forth in claim 25, Bisdikian discloses a method wherein performance of the network tests is transparent to the user devices; see col. 4, lines 9-20 (when the tests have to be performed after the operation of the network the tests must occur without disruption to the flow of the network and therefore would operate transparently).

As set forth in claim 26, Bisdikian discloses a method wherein transmission of the network performance data from the user devices to the experience test server is transparent to users operating the user devices. see col. 4, lines 9-20 (when the tests have to be performed after the operation of the network the tests must occur without disruption to the flow of the network and therefore would operate transparently)

As set forth in claim 27, Bisdikian discloses a network monitoring system for monitoring network-based services over a distributed network; see col. 3, lines 37-51, comprising: a plurality

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of user devices capable of performing network tests and collecting data about end-user experience, wherein the user devices are configured to notify an experience test server of an availability to perform network tests in response to being connected to the distributed network; see col. 3, line 51-col. 4, line 9; and the experience test server, configured to receive availability notifications from the user devices and to distribute instructions to the user devices that are available to perform network tests, wherein at least some of the instructions direct the user devices to perform network tests; see col. 5, lines 12-55, and wherein the experience test server collects network performance data generated by the user devices that perform the network tests (web server 41 may store the results in a database). Bisdikian discusses the usage of test servers in the process of monitoring the system and that during this monitoring of the system the subscribers will be in contact with the test servers in order to determine various features of the system. In order to perform these tests the subscribers in Bisdikian must notify the test servers of their existence and willingness to perform tests. Furthermore the test servers must in turn perform in accordance to the tests done with the subscribers.

As set forth in claim 28, Bisdikian discloses a system wherein the user devices perform network tests that are transparent to the users operating the user devices; see col. 4, lines 9-20 (when the tests have to be performed after the operation of the network the tests must occur without disruption to the flow of the network and therefore would operate transparently).

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As set forth in claim 29, Bisdikian discloses a system wherein the user devices send network performance data to the experience test server in a manner transparent to users operating the users devices; see col. 4, lines 9-20 (when the tests have to be performed after the operation of the network the tests must occur without disruption to the flow of the network and therefore would operate transparently).

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 19-22, and 30-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bisdikian et al (US 6,205,413).

Regarding claims 19-22, Bisdikian discloses allocating tests to client modules when the client module connects to the server (col. 3, lines 24-50) but does not disclose allocating tests to clients over time, checking test quota limits, allocating tests over a time period based on a test rate, or dynamically changing test allocation. In the network management field, it is well known to allocate tests to clients over time, checking quota limits, allocating tests based on a test rate

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and changing test allocation. It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the system of Bisdikian to allocate tests to clients over time, checking test quota limits, allocating tests over a time period based on a test rate, or dynamically changing test allocation, thereby providing the network manager with a flexible system which enables him to customize the tests allocated to the network clients.

5. Claims 16 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bisdikian et al (US 6,205,413) in view of Fletcher et al (US 6,321,264).

As set forth in claim 16, Bisdikian discloses a method of monitoring end-user experience of a plurality of users operating a plurality of interfaces to a distributed network, wherein each of the plurality of users is associated with an account on the network, the method comprising: detecting in response to a user invoking a connection code (when a user has a virtual subscriber coexisting on the user's computer system and proceeds to connect to the service provider; see col. 3, lines 47-50 (personal run and manage the invocation of the software, which essentially behaves as one of the users of the system in order to obtain information about the network, the role of the individual who monitors the incoming data is the only difference between that which is contemplated by the applicant and that found in Bisdikian) to connect to a distributed network (col. 3, lines 24-62; col. 4, line 46 - col. 5, line 63); when the user invokes the connection code (when a user has a virtual subscriber coexisting on the user's computer system and proceeds to

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connect to the service provider), monitoring the connection code to obtain user experience data about the connection process, wherein the user experience data is data relating to the user's experience with the network (col. 3, lines 24-62; col. 4, line 46 - col. 5, line 63); transmitting the data obtained from the connection process to an experience test server (col. 3, lines 24-62; col. 4, line 46 - col. 5, line 63).

Regarding claim 16, Bisdikian does not disclose determining compliance with a service level agreement based upon the collected data. However, Fletcher discloses a network monitoring system, which collects data and allows the network manager to determine whether the collected data satisfies the provisions of a service level agreement (col. 4, lines 50-59). It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the monitoring system of Bisdikian with the ability to determine whether the collected data satisfied the provisions of a service level agreement as disclosed by Fletcher. The rationale is as follows: as service level agreements are often agreed upon for quality critical information services, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the data collection system of Bisdikian with the ability to identify whether the collected data complied with a service level agreement, thereby enabling the system to identify when the quality of service is below an acceptable level so that actions may be taken to correct the degradation of service and restore the connection to a level within the service agreement.

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As set forth in claim 17, Bisdikian discloses the monitoring done as a background process (col. 3, lines 24-62; col. 4, line 46 - col. 5, line 63).

***Response to Arguments***

6. Applicant argues that new claims 24 and 27 are allowable because Bisdikian does not disclose notifying a test server of the capability of the subscribers to perform tests. The Examiner disagrees noting that Bisdikian discusses the usage of test servers in the process of monitoring the system and that during this monitoring of the system the subscribers will be in contact with the test servers in order to determine various features of the system. In order to perform these tests the subscribers in Bisdikian must notify the test servers of their existence and willingness to perform tests. Furthermore the test servers must in turn perform in accordance to the tests done with the subscribers; see col. 5, lines 12-55. Although applicant may be contemplating a different scenario than that used in Bisdikian, the claims as written read upon Bisdikian.

Applicant argues that claim 16 requires a user and not a “virtual user” as found in Bisdikian. Therefore Bisdikian cannot “detect that a user invokes a connection code to connect a client system to the distributed network and to monitor the connection code to obtain user experience data about the connection process in response to the user invoking the connection code.” The Examiner contends that Bisdikian’s purpose is to test the status of the network. In

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order for Bisdikian to do this “virtual subscribers” are used for the testing of the situation. However, individuals (e.g. system managers) perform these tests in order to gather data about the network. These individuals initiate and set up the conditions for the test over the distributed network. They initiate the connection code and run the tests. The Examiner maintains that even in amended form, Bisdikian meets the limitations of the claims.

*Allowable Subject Matter*

7. Claims 1-3, and 5-9 are allowed.

8. Claim 23 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims

*Conclusion*

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

11. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Glenton Burgess, can be reached at (703) 305-4792. The fax phone number for this art unit is (703) 305-2701. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the technology center receptionist whose telephone number is (703) 305-3900.

Tod Kupstas

  
Jan 8, 2003

  
GLENTON B. BURGESS  
SUPERVISORY PATENT EXAMINER  
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